was a federal claim, the Court recharacterized it as such, and that characterization rendered the claim removable. As Chief Judge Posner explained, "[t]his is an uncontroversial application of the 'artful pleading' doctrine." *Id.* at 490 (citation omitted).

Judge Kocoras recognized that the argument for complete preemption under Section 332 is even stronger than under other parts of the Communications Act because in Section 332, the displacement of state regulation is expressly stated in plain language, while preemption under the filed-tariff doctrine, on which *Cahnmann* rested, is implied. Thus, as the district court noted, "so long as Bastien's claims question AT&T Wireless's market entry, then they are preempted by the Act." (R.14 at 11)

Like its displacement of state-law regulation of entry, Congress expressly displaced all state regulation of rates charged for wireless telephone service: Section 332(c)(3)(A) specifically provides that *no state or local government shall have any authority to regulate rates*. It is well settled that a claim for damages is a powerful form of state regulation. *See, e.g., San Diego Bldg. Trade Council v. Garmon*, 359 U.S. 236, 247 (1959). Bastien's demand that an automatic rebate should have been provided by making quick calls available after every "dropped" call is squarely a rate-related matter, which is completely preempted by Section 332.

The cases have long held that rebates, rates and services are intertwined. Indeed, the Supreme Court recently emphasized that "[r]ates do not exist in isolation . . . Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1963 (1998). Any preference or "misquoting" of rates was considered a means for offering a rebate and was prohibited, because it led to discrimination among customers. *Id.* Bastien's

spin aside, any relief provided on a state-law claim would inevitably equate with the regulation of wireless telephone rates by the state, which is specifically prohibited by Section 332(c)(3)(A).

As in *Cahnmann*, Bastien's only claims relate to rates or entry for wireless services and have been wholly displaced. They can *only* arise under federal law; the state has *no authority* to regulate them. *See* 47 U.S.C. § 332(c)(3)(A). As this Court noted in *Cahnmann*, regardless of how "emphatically [plaintiff] disclaims any intention of prosecuting a federal claim," removal was proper. *Id.* at 489-90. Thus, even if cast in contract or tort language, complaints challenging entry into the wireless market or wireless rates cannot avoid their inherent federal nature to prevent removal.

B. Saving Clauses Do Not "Save" State Regulation in Areas of the Law That Are Expressly Preempted for Exclusive Federal Regulation.

The Supreme Court and this Court have consistently refused to permit the saving clause of the Communications Act to swallow the preemption provision, as Bastien seeks to do. Although Section 414, provides "nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies," 47 U.S.C. § 414, Bastien's interpretation of this provision would eviscerate the carefully-balanced federal regulatory scheme that Congress and the FCC have established. It is well settled that a saving clause cannot swallow up or "gut" the terms of the statute itself. *See Cahnmann*, 133 F.3d at 488. In *Central Office Telephone*, the Supreme Court stated:

> The [saving] clause . . . cannot in reason be construed as continuing in [customers] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act

> cannot be held to destroy itself. [*Citing Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).]

118 S.Ct. at 1965. Thus, contrary to Bastien's argument, the saving clause of the Communications Act preserves *only* those rights that are *not inconsistent* with the rest of the statute. State-law claims that are inconsistent with the preempted areas cannot be "saved," even under an express saving clause. *See Cahnmann*, 133 F.3d at 488.

The saving provision of Section 332 provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the *other terms and conditions* of commercial mobile services." Bastien ignores the word "other," which means claims *other than* those that attack entry and rates.[9] The word "other" differentiates saved claims from claims that fall within the "rates" and "entry" prohibitions.

Congress's intent to save claims *other than* those attacking entry and rates does not contradict its intent to displace all state regulation of the areas of entry and rates with federal law. Congress need not preempt an entire legal subject matter; whatever scope of preemption Congress defines in the statute must be honored. *See, e.g., Bartholet*, 953 F.2d at 1075 ("complete preemption" does not require that everything in the entire field covered by a statute be preempted; complete preemption is inevitably limited to a *particular, defined* area of the law). Even *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394-95 (1987), on which Bastien extensively relies, explains that "complete preemption" only means "complete" within

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[9] Since the word "other" in this sentence is not ambiguous (and Bastien has not argued that it is), the Court need not look to the legislative history for guidance, *see, e.g., United States v. Turkette*, 452 U.S. 576, 580 (1981), because the result urged is at odds with the

a particular, defined area of law. In *Caterpillar*, the Court held that while claims based on collective bargaining agreements are completely preempted, claims based on contracts *separate from* a collective bargaining agreement are not. *See Caterpillar*, 482 U.S. at 394, 395. *Caterpillar* supports AT&T Wireless's position here because the Communications Act expressly extinguishes state regulation of the very conduct that Bastien's Complaint attacks: AT&T Wireless's entry and rates in the wireless market. Within these defined areas, state claims are "blotted out," *see Bartholet* at 1075, and all claims are necessarily federal and thus removable.

Bastien's reliance on certain cases allowing state law claims to proceed is misplaced because, in each of those cases, the conduct alleged was *not inconsistent* with the Communications Act. (Appellant Br. at 14-16) Not one of the cases Bastien cites involved claims challenging entry into or rates in the market, nor did they involve express preemption under Section 332, as the Complaint does here.[10]

Another defect in Bastien's authorities is that several conflict directly with this Court's decision in *Cahnmann* as well as with the Supreme Court's decision in *Central Office Telephone*, which held that even claims pled in tort or contract terms cannot survive the

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[10] *E.g., Corporate Hous. Sys., Inc. v. Cable & Wireless, Inc.*, 12 F. Supp. 2d 688, 690-91 (N.D. Ohio 1998) (invoice dispute that "neither directly nor indirectly challenges . . . rates"); *Bauchelle v. AT&T Corp.*, 989 F. Supp. 636 (D.N.J. 1997) (attack on specific promotional practices that did not challenge rates); *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 553 (D.N.J. 1996) (challenge to advertising practices, not rates or entry); *Castellanos v. U.S. Long Distance Corp.*, 928 F. Supp. 753, 755-56 (N.D. Ill. 1996) (attack on "slamming," not rates or entry); *Cooperative Communications Inc. v. AT&T Corp.*, 867 F. Supp. 1511, 1516 (D. Utah, 1994) (unfair competition claim; did not challenge rates or entry); *KVHP TV Partners, Ltd. v. Channel 12 of Beaumont, Inc.*, 874 F. Supp. 756 (E.D. Tex. 1995) (tortious interference with business of television station owner; not challenge to rates or entry); *Kellerman v. MCI Telecommunications Corp.*, 493 N.E.2d 1045, 1051 (Ill. 1986) (deceptive advertising claim that "involves neither quality of defendant's service or the

preemptive effect of the filed-tariff doctrine if they touch subjects covered by the tariff.[11] Finally, every case that Bastien cites was decided before this Court's decision in *Cahnmann*, which recognized complete preemption of a class of claims under the Communications Act, even in an area where no express preemption clause existed. Thus, to the extent that Bastien's authorities ignored the complete preemption doctrine under the Communications Act, they are not instructive. *See Corporate Housing Sys.*, 12 F. Supp. 2d at 690-91; *Bauchelle*, 989 F. Supp. at 636; *DeCastro*, 935 F. Supp. at 554; *Castellanos*, 928 F. Supp. at 755-56; *Esquivel*, 920 F. Supp. at 413; *KVHP TV Partners*, 874 F. Supp. at 756; *Financial Planning Institute*, 788 F. Supp. at 75; *American Inmate Phone Sys.*, 787 F. Supp. at 856-57.

C. Bastien's Claims Must Arise—If at All—Under the Communications Act.

1. The Complaint Directly Challenges AT&T Wireless's Entry Into the Market.

As discussed above, the Complaint does nothing but attack AT&T Wireless's provision of wireless service "without first building cellular towers and other infrastructure necessary to provide reliable cellular service." (R.1, Ex. 1 at ¶¶ 1, 9, 19b, 23, 25a, 26a; *see also* Appellant Br. at 5) In an effort to avoid his Complaint's direct attack on AT&T Wireless's entry into the market, Bastien's appeal ignores his Complaint's challenge to the

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[11] *E.g., Esquivel v. Southwestern Bell Mobile Sys., Inc.*, 920 F. Supp. 413 (E.D. Tex. 1996); *Cellular Dynamics, Inc. v. MCI Telecomm. Corp.*, 1995 U.S. Dist. Lexis 4798 at **8-9 (N.D. Ill.); *Financial Planning Institute, Inc. v. AT&T Co.*, 788 F. Supp. 75 (D. Mass. 1992); *American Inmate Phone Sys., Inc. v. U.S. Sprint Communications Co.*, 787 F. Supp. 852, 856-57 (N.D. Ill. 1992); *Bruss Co. v. Allnet Communications Servs., Inc.*, 606 F. Supp. 401, 411 (N.D. Ill. 1985). Because each of these cases questioned subjects covered by filed tariffs, their holdings are highly questionable after *Cahnmann* and *Central Office Telephone*

adequacy of AT&T Wireless's infrastructure, which was the gravamen of his Complaint. Instead, he posits new factors that hypothetically could have resulted in "dropped" calls, such as "labor disputes" and "personnel problems," none of which was ever mentioned in his Complaint.[12] Appellant Br. at 18 n.6. Bastien has not pled — nor could he — that AT&T Wireless promised its customers that service would never be interrupted due to labor strikes, "technical glitches," or a host of other problems that occur in the real world. But more importantly, Bastien cannot avoid the language he elected to plead in the Complaint: that AT&T Wireless allegedly violated the law by providing wireless telephone service "without first building [more] cellular towers and other infrastructure." (R.1, Ex. 1 at ¶ 23) As Judge Kocoras recognized:

> While Bastien denies that he questions AT&T Wireless's market entry, *he does just that*. It would require an incredible stretch of the English language to interpret [the contract claim of the complaint] to mean anything but a challenge to AT&T Wireless's ability to enter the Chicago Market.

(R.14 at 11)

Because Bastien's consumer-fraud claim is based on virtually the same allegations, it, too, challenges AT&T Wireless's right to enter the market. As the district court found: "[a]lthough Bastien vigorously denies that he makes such a challenge, his allegations speak for themselves." (*Id.* at 13) Thus, paragraphs 26 and 25a of the Complaint,[13] which

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[12] Even while hypothesizing these unpled problems, Bastien cannot resist repeating that "dropped" calls might be due to "lack of equipment" or "insufficient servicing infrastructure," Appellant Br. at 18 n.6, which underscores that his challenge is really to AT&T Wireless's entry into the market.

[13] For the contract claim, Paragraph 26 alleges:

> AT&T Wireless knew that it was signing up subscribers without first building the cellular towers and other infrastructure necessary to handle the calls reasonably expected to be used by such subscribers, and that a large proportion of attempts to place calls on AT&T Wireless's system would be unsuccessful.

purport to allege consumer fraud, "do little more than Paragraph 23, which this Court already determined was a challenge to AT&T Wireless' right to market entry." (R.14 at 13)

Bastien contends that even though AT&T Wireless fully complied with the FCC's standards for market entry — as he admits AT&T Wireless has always done, *e.g.*, Appellant Br. at 24 — some undefined additional preparation is required before AT&T Wireless may provide service to customers. In essence, he demands that AT&T Wireless forego market entry until it has met not only the detailed rules and regulations promulgated by the FCC build-out requirements, 47 C.F.R. §§ 24.103, 24.203, geographic area and population percentage coverage requirements, *id.*, and antenna power regulations, 47 C.F.R. §§ 132, 232, but also some additional, unstated standards — presumably ones high enough so that customers never experience "dropped" calls.[14] Under this theory, to avoid liability, AT&T Wireless would have to stay out of the market until it achieved a level of perfection that would satisfy Mr. Bastien. The Complaint would thus have the effect of regulating AT&T Wireless's entry into the market, which Judge Kocoras correctly found preempted by the Act. (R.14 at 10-11)("The preemption clause . . . essentially extinguish[es] all state causes of action that question directly or indirectly the right to enter the market.")

Paragraph 25a alleges that AT&T Wireless committed consumer fraud by:

> Signing up subscribers without first building the cellular towers and other infrastructure necessary to accommodate good cellular communications to such subscribers, with the result that a larger proportion of attempts to place calls on AT&T Wireless's system are unsuccessful.

[14] Bastien attempts to minimize the complexity of the FCC's scheme of federal regulation by implying that the only "duty imposed by the FCC regulations is to put out a minimum signal." (Appellant Br. at 24) But, as the district court recognized, the FCC regulations are extensive. (R.14 at 10) ("What is highly regulated, however, are the terms

Although, in his Appellant Brief, Bastien tries to switch gears and demand that the wireless carrier guarantee flawless redial-within-sixty-seconds credit service so that the customer does not even have to request a refund in order to obtain one, that theory finds no support in his Complaint.[15] The Complaint conceded that Bastien knew he would receive automatic credits for "dropped" calls only when he was able to redial within sixty seconds, and the FCC's response to his informal complaint both underscored the fact that Bastien's agreement with AT&T Wireless provided that "automatic credit" is available only when "certain criteria have been met," and revealed the alternate credit procedure, by which the customer who cannot successfully redial within sixty seconds gets credits by calling AT&T Wireless's "customer care" service, which is available twenty-four hours a day, seven days a week. (R.12, Ex. C) Although Bastien received $350 in credits within his first three months as an AT&T Wireless customer, he fails to mention these substantial refunds in either his Complaint or his brief to this Court. But more importantly, this new "guaranteed redial" allegation is not part of Bastien's Complaint.

Bastien's direct attack on AT&T Wireless's right to provide service does not present a close question; it falls squarely within the field of entry into the market, which is preempted by Section 332. *See Bartholet*, 953 F.2d at 1075. It attempts to use state law to regulate the very conduct that has been reserved exclusively for *federal* regulation. If Bastien had a claim, it could only be federal; and, as such, it was properly removed. *See* 28 U.S.C. § 1441(b).

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[15] The FCC does not require any such guarantee, and even if Bastien's Complaint were based on such an allegation, it would be preempted as a challenge to both entry and rates. Indeed, the technology that would be required to meet Bastien's standard would prevent most

2. Bastien Challenges the Rates That AT&T Wireless Charges for Its Services.

While purportedly conceding that AT&T Wireless's rates are reasonable, Appellant Br. at 26, Bastien asks the Court to award Bastien and a putative class monetary and "other and further relief" as a form of rebate for "dropped" calls (*see* R.1, Ex. 1, prayer for relief), and thereby seeks to regulate rates. Insofar as the Appellant Brief suggests that Bastien is seeking refunds for alleged inconvenience in having to call AT&T Wireless's customer care service to obtain dropped-call credits rather than having the credits automatically appear on the customer's account, it is a direct attack on AT&T Wireless's rates. Any such monetary relief would effectively constitute regulation of the rates that AT&T Wireless charges for its wireless service; in fact, the threat of damages provides the strongest form of regulation. *See San Diego Bldg. Trades Council*, 359 U.S. at 247-48. As shown above, attacks on rates of wireless carriers are completely preempted by Section 332.

In essence, Bastien wants to adjust the rates that AT&T Wireless charges its customers, or to adjust the level of AT&T Wireless's service at its current rates. In either case, the relief would amount to regulation of AT&T Wireless's rates, because "any claim for excessive rates can be couched as a claim for inadequate services and vice versa." *Central Office Telephone, Inc.*, 118 S.Ct. at 1963.

In *Central Office Telephone*, the Supreme Court rejected an argument much like the one Bastien makes here. There, Central Office Telephone argued that its claim did not involve rates or rate-setting, which is preempted, but rather "the provision of services and billing." *Central Office Telephone*, 118 S.Ct. at 1963 (citations omitted). But after explaining how the giving of "a lower price for equivalent service" or "enhanced service for an equivalent price," both involve setting rates, the Supreme Court explained that rates "do

not exist in isolation. They have meaning only when one knows the services to which they are attached." 118 S.Ct. at 1963.

Here as well, if a state court were to decide whether Bastien should recover rebates beyond the credits he has already received for "dropped" calls, it would inevitably have to determine, first, whether AT&T Wireless's rates are reasonable given the level of service provided, and, if not, what rates should be charged. To determine what rates are appropriate under circumstances where some calls are allegedly "dropped" would be to engage in rate-setting of the most basic variety. Section 332 expressly prohibits doing this under state law, because rate regulation is within the exclusive ambit of the Communications Act, 47 U.S.C. § 332. Bastien's request for a refund through his damages claim directly attempts to regulate AT&T Wireless's rates, and such a claim can only arise under the Act.

III. Bastien Does Not Contest the District Court's Conclusion That He Has Chosen Not to Proceed on a Communications Act Claim.

Bastien concedes that when his Complaint is recharacterized as one that can only arise under the Federal Communications Act,[16] he has failed to plead a violation.[17] He has, therefore, waived any challenge to the district court's conclusion in this regard. *See* R.12 at

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[16] Challenges to rates or entry can be brought under the Act's civil enforcement provision, Section 207, which provides that violations of any of the substantive provisions can be enforced privately in a federal district court or in the FCC. *See* 47 U.S.C. § 207. Section 201(b) provides that a telephone service provider's charges and practices must be reasonable, and it is this substantive provision that would allow Bastien to challenge AT&T Wireless's rates or practices, including entry into the wireless market. *See* 47 U.S.C. § 201(b).

[17] Bastien's citation to *Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177, 1180-82 (7th Cir. 1989), is puzzling and unhelpful. Bastien appears to argue that if the Complaint is recast as a Communications Act claim, it is "wholly insubstantial" and "frivolous," and that his Complaint's insubstantiality somehow deprives this Court of subject matter jurisdiction. *See* Appellant Br. at 18. This Court rejected a similar argument in *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 613 (7th Cir. 1997).

12, 13.[18] Like the plaintiff in *Cahnmann*, Bastien has "emphatically disclaim[ed] any intention of prosecuting a federal claim." *Cahnmann*, 133 F.3d at 489.[19] Therefore, outright dismissal rather than reference to the FCC under the doctrine of primary jurisdiction was appropriate. *See id.* at 491.

The frivolity of Bastien's purported state-law claims betrays his claims for what they are: a frontal attack on AT&T Wireless's infrastructure and rates — which dooms them as completely preempted by Section 332. Despite all the rhetoric in both his Appellate Brief and his brief below about "contractual" obligations, commitments or undertakings, his Complaint lacks even the most basic elements of a contract claim, and none of his briefs have even attempted to address that problem.

For example, Bastien never attached any contract to his state-court complaint, as required under *Smith v. Prime Cable*, 658 N.E.2d 1325 (Ill. App. 1st Dist. 1995). He also fails to plead the existence of a contract, his performance of all terms and conditions of the contract, the alleged terms that he claims AT&T Wireless breached,[20] or any harm flowing

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[18] Arguments not raised in an appellant's opening brief are waived and are not considered by this Court. *See, e.g., Marie O. v. Edgar*, 131 F.3d 610, 614 n.7 (7th Cir. 1997) ("[The United States Court of Appeals for the Seventh Circuit] does not consider arguments raised for the first time in the reply brief." (*citing United States v. Magana*, 118 F.3d 1173, 1198 n.15 (7th Cir. 1997)).

[19] *See* Appellant Br. at 23, 24, 26, conceding that the Complaint does not allege any violation of federal law.

[20] As discussed at page 20 above, Bastien's attempt to switch theories on appeal to suggest that AT&T Wireless guaranteed that he could always redial a "dropped" call within sixty seconds is undermined by ¶ 15 of his own Complaint, which shows he knew that successful redialing would not always be possible. As this Court held in *Bartholet*, 953 F.2d at 1078, "plaintiffs can plead themselves out of court" by pleading a fact inconsistent with their legal theory. Bastien did that here by conceding that he knew automatic credits were available only *"as long as* the customer *successfully* redials within sixty seconds." If success were guaranteed, there would be no "as long as." Furthermore, AT&T Wireless never made

from the alleged breach — all of which are required by Illinois law. *See Harris Trust and Sav. Bank v. Salomon Bros. Inc.*, 832 F. Supp. 1169, 1175-76 (N.D. Ill. 1993). In any case, Bastien cannot recover money voluntarily paid to AT&T Wireless without also pleading that he paid the money under legal duress. *See Dreyfus v. Ameritech Mobile Communications, Inc.*, 700 N.E.2d 162 (Ill. App. 1st Dist. 1998). The absence of such an allegation is fatal to this claim. *See Goldstein Oil Co. v. Cook County*, 509 N.E.2d 538, 540 (Ill. App. 1st Dist. 1987) (plaintiff must plead around voluntary payment doctrine as part of the *prima facie* case); *see also Smith v. Prime Cable*, 658 N.E.2d 1325, 1330 (Ill. App. 1st Dist. 1995) (customers could not recover pay-per-view fees they had voluntarily paid, because "[t]o negate the applicability of the voluntary payment doctrine, one must show not only that the claim asserted was unlawful but also that the payment was not voluntary."). Bastien's repeated allegations about AT&T Wireless's allegedly deficient infrastructure are designed to mask the blatant defects in his contract claim. What they really do, however, is *unmask* his Complaint as a challenge to rates and entry.

Bastien's consumer-fraud claim does not conceal his quintessentially federal claim any better. Despite vague and conclusory references to misrepresentations and omissions about AT&T Wireless's allegedly inadequate infrastructure, the Complaint fails to plead with the particularity required under Rule 9, Fed, R. Civ. P., or Illinois pleading requirements, *see Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584 (Ill. 1997), the "who, what, when, where, and how" of the alleged misrepresentations, which is fatal to any such claim. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (summarizing minimum

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In any event, this Court has held that a party may not amend his complaint through his briefs either in the district court or in this Court on appeal. *E.g., Thomason v.*

allegations to satisfy Rule 9(b)); *Alexander v. Continental Motor Werks, Inc.*, No. 95 C 5828, 1996 U.S. Dist. Lexis 1849 at *19 (N.D. Ill. Feb. 15, 1996) (Kocoras, J.) (applying Rule 9(b) particularity requirement to dismiss Illinois Consumer Fraud actions). The obvious lack of merit in the purported consumer fraud claim also betrays its true nature as necessarily federal, and thus removable under 28 U.S.C. § 1441(b).

CONCLUSION

For the foregoing reasons, the ruling of the district court should be affirmed.

Respectfully submitted,

Dated: July 30, 1999.

Fay Clayton

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DEFENDANT-APPELLANT'S

UNPUBLISHED AUTHORITIES

1996 U.S. Dist. LEXIS 1849 printed in FULL format.

JOSEPH R. ALEXANDER, ETHEL L. ALEXANDER and TAYLOR CLEVELAND on behalf of themselves and all others similarly situated, Plaintiffs, v. CONTINENTAL MOTOR WERKS, INC., d/b/a A-1 CONTINENTAL MOTOR WERKS, INC., and EAGLE FINANCE CORP., Defendant.

95 C 5828

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1996 U.S. Dist. LEXIS 1849

February 15, 1996, Dated

February 16, 1996, DOCKETED

SUBSEQUENT HISTORY: [*1] Motion for Reconsideration Denied May 7, 1996, Reported at: *1996 U.S. Dist. LEXIS 6133.* Motion to Reconsider or Clarify Denied September 11, 1996, Reported at: *1996 U.S. Dist. LEXIS 13425.*

COUNSEL: For JOSEPH R. ALEXANDER, ETHEL L. ALEXANDER, TAYLOR CLEVELAND, on behalf of themselves and all others similarly situated, plaintiffs: Daniel A. Edelman, [COR LD NTC A], James O. Latturner, [COR], Cathleen M. Combs, [COR], Michelle Ann Weinberg, [COR], Edelman & Combs, Chicago, IL.

For CONTINENTAL MOTOR WERKS, INC dba A-1 Continental Motor Werks, Inc, defendant: Gary Edward Wilcox, [COR], Richard M. Karr, [COR LD NTC A], Jonathan Paul Geen, [COR], John C. Eggert, [COR], Hardt & Stern, P C, Chicago, IL. For EAGLE FINANCE CORP, defendant: Ray G. Rezner, [COR LD NTC A], Mark Scott Bernstein, [COR], Richard Allen Saldinger, [COR], Barack, Ferrazzano, Kirschbaum & Perlman, Chicago, IL.

JUDGES: Charles P. Kocoras, United States District Judge

OPINIONBY: Charles P. Kocoras

OPINION: MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the court on several motions. Defendants Continental Motor Werks, Inc. ("Continental") and Eagle Finance Corp. ("Eagle") have each filed motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In addition, the plaintiffs have filed their motion for class certification. For the reasons [*2] set forth below, Continental's motion to dismiss is granted, although Plaintiffs are granted leave to reinstate the complaint pending a March 1996 disposition by the Federal Reserve Board. Eagle's motion to dismiss is granted. Provided that the action is reinstated, the plaintiffs motion for class certification as to Class A is granted.

BACKGROUND

The plaintiffs brought this action pursuant to the federal Truth in Lending Act ("TILA"), *15 U.S.C. § 1601* et seq., the Illinois Consumer Fraud Act ("ICFA"), 815 ILCS 505/2, the Illinois Motor Vehicle Retail Installment Sales Act ("MVRISA"), 815 ILCS 375/5, and the Illinois Sales Finance Agency Act ("ISFAA"), 205 ILCS 660/16. The plaintiffs seek injunctive and monetary relief against a car dealership (Continental) and an assignee of the retail installment sales contract (Eagle) for alleged violations of these statutes.

The plaintiffs, individually, purchased cars from Continental for personal, family, or household purposes. In connection with this transaction, each plaintiff signed a motor vehicle "Retail Installment Contract" ("RIC") which also served as the disclosure statement required under TILA. Each of the plaintiffs similarly [*3] purchased through Continental an extended warranty or service contract as part of the sales transaction. Plaintiff Alexander, for example, purchased an extended service contract from Continental for which he was charged $ 995.00

The price for the extended warranty was reflected in the RIC as part of the amount financed by each plaintiff under the heading "Amounts Paid to Others for You." This heading, which was located under the section "Itemization of the Amount Financed" listed the items as follows:

Amounts Paid to Others for You

Pay-off to prior loan	$ N/A
To:	
Insurance Companies	$ N/A
Public Officials	$ 61.00
(License, Title & Taxes)	
To: Documentary Service Fee	$ 40.00
To: E.S.C.	$ 995.00
To: N/A	$ N/A

In their amended complaint, the plaintiffs allege that the RIC failed to accurately represent the price of the extended warranty. The plaintiffs further maintain that Continental misrepresented the price which it paid to a third party for the extended warranty/service contract which Continental purchased on behalf of the plaintiffs. Specifically, the plaintiffs claim that the disclosures in the RICs are inaccurate and [*4] misleading because only a portion of the $ 995.00 charged was paid to a third party; the remaining amount was kept by Continental. The plaintiffs allege that this practice caused the fees charged for the service contract to appear non-negotiable, thereby allowing Continental to overcharge the plaintiffs.

The plaintiffs brought a four-count complaint against Continental, the dealer, and Eagle, as an assignee to the sales contract. Count I alleges TILA violations by Continental and Eagle to the effect that these defendants disclosed in the plaintiffs' RIC that an amount was paid to a third party for an extended service contract when such amount was not in fact paid to a third party. Counts II and III allege that such non-disclosure also constitutes misrepresentation actionable under the ICFA. Count IV, brought solely against Eagle, alleges violations by the assignee of the ISFAA. Both Continental and Eagle have moved for dismissal. The plaintiffs additionally move for class certification.

LEGAL STANDARD

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Defendants must meet a high standard [*5] in order to have a complaint dismissed for failure to state a claim upon which relief may court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. *Ed Miniat, Inc. v. Globe Life Ins. Group Inc., 805 F.2d 732, 733 (7th Cir. 1986)*, cert. denied, *482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987)*. The allegations of a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. See also *Hishon v. King & Spalding, 467 U.S. 69, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); Doe on Behalf of Doe v. St. Joseph's Hospital, 788 F.2d 411 (7th Cir. 1986)*. Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. *Gray v. County of Dane, 854 F.2d 179, 182 (7th Cir. 1988)*. We turn [*6] to the motion before us with these principles in mind.

DISCUSSION

A. Continental's Motion to Dismiss

Continental moves for dismissal from the plaintiffs' action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Counts I, II, and III of the plaintiffs' amended complaint assert violations by Continental (and Eagle) of TILA and the ICFA. The sufficiency of each of these claims as they pertain to Continental will be addressed below.

1. Count I: Plaintiffs' TILA Claim

The Truth in Lending Act has the broad purpose and intent of promoting "meaningful disclosure of credit

the various credit terms available. . . and to avoid the uninformed use of credit." *15 U.S.C. § 1601*(a). It is fundamental that any TILA disclosure must be accurate. See *Goldman v. First Nat'l Bank, 532 F.2d 10, 22 (7th Cir. 1976)* ("Congress clearly sought to compel accurate disclosure. . . ."), cert. denied, *429 U.S. 870, 50 L. Ed. 2d 150, 97 S. Ct. 183 (1976); In re Cox, 114 Bankr. 165, 168 (Bankr. C.D.Ill. 1990)* ("A meaningful disclosure cannot be one which is inaccurate"). Moreover, in implementing TILA, Congress [*7] "delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit." *Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 559-60, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980).* In response to this grant of authority, the Federal Reserve Board has issued governing regulations, commonly referred to as Regulation Z. See 12 C.F.R. § 226.

The plaintiffs assert that Continental's manner of disclosing the price of the extended warranty violates TILA, and specifically, Regulation Z, 12 C.F.R. § 226.18, which states in pertinent part:

For each transaction, the creditor shall disclose the following information as applicable:

* * *

(c) Itemization of amount financed. (1) A separate written itemization of the amount financed, including:

* * *

(iii) Any amounts paid to other persons by the creditor on the consumer's behalf. The creditor shall identify those persons.

12 C.F.R. § 226.18. Significantly, numerous courts in this district have sustained virtually identical TILA and ICFA claims on motions to dismiss. See, e.g., *Shields v. Lefta, Inc., 888 F. Supp. 894 (N.D.Ill. 1995); Chandler v. Southwest [*8] Jeep-Eagle Inc., 162 F.R.D. 302 (N.D.Ill. 1995); Cirone-Shadow v. Union Nissan, Inc., 1995 U.S. Dist. LEXIS 1379, 1995 WL 51547* (N.D.Ill. February 3, 1995).

In ruling on the degree to which a creditor's actual disclosures must match the requirements of TILA and Regulation Z, the Seventh Circuit has held that "strict adherence" is the rule and that even the most technical disclosure violation is actionable. *Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407, 416-17 (7th Cir. 1980).* As such, the plaintiffs' TILA allegations, based upon the RIC's listing of the $ 995.00

The fact that the RIC utilized by Continental was based on a model form drafted by the Federal Reserve Board does not absolve Continental of TILA liability. First, a defense based upon good faith compliance is not appropriate on a motion to dismiss. Moreover, any violation of TILA here springs from the placing of cash in the dealer's pocket under the guise of amounts charged to others. It cannot and does not issue from the placement of the charges, which, in the present case, was authorized by the regulations. Thus, to the extent [*9] that the plaintiffs may argue misrepresentation based upon the extended warranty charge being placed among so-called non-negotiable items, e.g, license and title fees, taxes, etc., the action under TILA cannot survive. See *Shields, 888 F. Supp. at 897.* However, to the extent that the plaintiffs base their claim upon the literal inaccuracy contained in the RIC, the plaintiffs have stated a claim under TILA. The cases cited above are in accord.

The continued viability of the plaintiffs' TILA claim, however, may not be long-lived, for a new development threatens to supersede the cases on which the plaintiffs rely. On December 7, 1995, the Federal Reserve Board issued a proposed commentary to Regulation Z which covers the specific issue in this case, i.e., the disclosure of a service contract fee where the creditor retains a portion of that fee. The proposed commentary, applicable to the earlier quoted section 226.18(c)(1)(iii), provides:

A creditor that offers an item for sale in both cash and credit transactions sometimes adds an amount (often referred to as an "upcharge") to a fee charged to a consumer by a third party for a service (such as for a maintenance or service [*10] contract) that is payable in an equal amount in both types of transactions, and retains that amount. At its option, the creditor may list the total charge (including the portion retained by it) as an amount paid to others, or it may choose to reflect the amounts in the manner in which they were actually paid to or retained by the appropriate parties (emphasis added).

60 Fed.Reg. 62,764, 62,769 (1995) (to be codified at 12 C.F.R. 226 after final adoption in March, 1996).

Notwithstanding the plaintiffs' pronouncements to the contrary, the proposed commentary, if passed in its current form, would effectively dispose of the TILA claim against Continental (and Eagle). It is well settled that the Federal Reserve Board's interpretation, construction, and application of TILA and Regulation Z are to be afforded great deference by the courts. See *Ford Motor Credit, 444 U.S. at 565-70 (1980)).* Furthermore, the proposed commentary, by its terms, aims at interpreting

ments of Regulation Z"). Because the proposed commentary does not propose to effect a substantive change in [*11] existing law but instead attempts to clarify it, the commentary, once passed, will be applicable to disputes arising before the commentary was promulgated. See *Pope v. Shalala, 998 F.2d 473, 482-86 (7th Cir. 1993)*. Given that the proposed commentary resolves the precise issue before us in the defendants' favor, it would seem that the legal sufficiency of the plaintiffs' TILA claim has been seriously undermined by the actions of the Federal Reserve Board. Accordingly, we dismiss the plaintiffs' TILA claim, with leave to reinstate if the proposed commentary is materially changed upon reaching its final form in March of 1996.

2. Counts II and III: The Illinois Consumer Fraud Act

Unlike TILA, the Consumer Fraud Act "does not mandate any particular form or subject of disclosure, but rather is a general prohibition of fraud and misrepresentation." *Lanier v. Associates Finance Inc., 114 Ill. 2d 1, 499 N.E.2d 440, 447, 101 Ill. Dec. 852 (Ill. 1986)*. In order to state a cause of action under the ICFA, a plaintiff must show (1) that the defendant engaged in a deceptive act or practice, (2) that the defendant intended the plaintiff to rely on the deception, and (3) that the deception [*12] occurred in the course of conduct involving trade or commerce. *Martin v. Heinold Commodities Inc., 163 Ill. 2d 33, 643 N.E.2d 734, 754, 205 Ill. Dec. 443 (Ill. 1994)*.

Continental maintains that, pursuant to the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure, the plaintiffs have not stated a claim under the ICFA. We disagree. Continental argues that the plaintiffs' complaint is deficient in several respects. Continental asserts, for example, that the plaintiffs have failed adequately to plead proximate cause, because the complaint does not state "when" the alleged violation transpired. However, the gravamen of the plaintiffs' ICFA claims is that the RIC misrepresents the amount being paid to a third party. It is the RIC which represents the enforceable contract between the parties, binding the plaintiffs to make payments on the car and on the service contract. It is thus the RIC and the misrepresentations alleged therein which proximately caused any damages which the plaintiffs may ultimately be able to establish. Continental's contention that the plaintiffs have not sufficiently alleged a basis for damages does not merit dismissal. Although Continental [*13] correctly asserts that damages are an essential element of a private cause of action under the Consumer Fraud Act, *Duran v. Leslie Oldsmobile Inc., 229 Ill. App. 3d 1032, 594 N.E.2d 1355, 1361-62, 171 Ill. Dec. 835 (Ill.App.Ct. 1992)*, at this early stage of the litigation, it cannot be said that the plaintiffs will be unable to establish damages.

The plaintiffs' ICFA claims, however, may be subject to the same fate as the plaintiffs' TILA claims. In Lanier, the Illinois Supreme Court observed:

> Because the Illinois consumer credit statutes requiring specific disclosures are met by compliance with the Truth in Lending Act, we believe that the Consumer Fraud Act's general prohibition of fraud and misrepresentation in consumer transactions did not require more extensive disclosure in the plaintiff's loan agreement than the disclosures required by the comprehensive provisions of the Truth in Lending Act.
>
> * * *
>
> The disclosure in the loan transaction between the plaintiff and the defendant complies with the Federal Reserve Board Regulation Z, and thereby comports with the Truth in Lending Act. Because the Act is a law administered by the Federal Reserve Board, we find [*14] that, under section 10b(1) of the Consumer Fraud Act, the defendant's compliance with the disclosure requirements of the Truth in Lending Act is a defense to liability under the Illinois Consumer Fraud Act in the present case.

Lanier, 499 N.E.2d at 447. Thus, a disclosure that complies with TILA cannot constitute a deceptive act or practice in violation of the ICFA. Because the plaintiffs' ICFA claims are founded upon the same conduct which allegedly violates TILA, the fates of these two claims are indissolubly connected. As such, similar to the plaintiffs' TILA claim, we dismiss the ICFA claims with leave to reinstate pending the passage of the proposed commentary to Regulation Z.

B. Eagles' Motion to Dismiss

The plaintiffs allege that Eagle, as an assignee of the retail installment sales contracts, knew that Continental misrepresented the amounts which Continental paid to Eagle as issuers of the extended warranty/service contracts. Based upon Eagle's alleged knowledge and general approval of Continental's practice of disclosing the price for the warranty in the alleged manner, the plaintiffs assert that Eagle is also liable under TILA, ICFA, MVRISA, and [*15] ISFAA. Eagle now moves for dismissal as to each of the plaintiffs' claims.

1. Count I: The TILA Claim

In Count I of the amended complaint, the plaintiffs' assert that Continental's manner of disclosing the price of the extended warranty violates TILA, and specifically,

Regulation Z, 12 C.F.R. § 226.18. The plaintiffs base their claim for relief against Eagle upon the allegation that Eagle, as the assignee of the contracts at issue, knew and generally approved of Continental's alleged practice of improperly disclosing the price for the extended warranty/service contracts.

Eagle argues that it cannot be held accountable for a TILA violation committed by Continental as a matter of law, because the alleged TILA violation was not "apparent on the face" of the RIC. In support of its motion, Eagle cites § 1641(a) of TILA, which states in relevant part:

any civil action for a violation of this subchapter or proceeding under section 1607 of this title which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where [*16] the assignment was involuntary. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this subchapter.

15 U.S.C. § 1641(a). Eagle moreover argues that the plaintiffs fail to allege this essential element against Eagle as an assignee, i.e., that Continental's allegedly improper manner of disclosing prices for the extended warranty is apparent on the face of the RIC.

In general, courts addressing the issue of TILA assignee liability have found that § 1641(a) limits liability when there is no indication from the disclosure documents that liability may arise. See, e.g., *Johnson v. Fleet Finance, Inc., 785 F. Supp. 1003, 1012 (S.D.Ga. 1992)* (dismissing a TILA claim against an assignee because the charges for original lender's informal requirement of a loan broker were not "apparent on the face" of the disclosure document); *Brodo v. Bankers Trust Co., 847 F. Supp. 353 (E.D.Pa. 1994)* (granting [*17] assignee's motion for summary judgment on alleged TILA violation because original lender's overcharges were not apparent on the face of the disclosure).

The above cited cases are persuasive to the case at bar. Like the documents in Johnson and Brodo, the alleged TILA violation here is not apparent on the face of the RIC. The word "apparent" has been defined to be that "which is obvious, evident, or manifest; . . . open to view, plain, patent." Blacks Law Dictionary, at p. 88 (5th ed. 1979). Contrary to this meaning, nothing in the plaintiffs' complaint alleges, or creates the reasonable inference, that Eagle had reason to doubt the accuracy or validity of the warranty/service charge on the RIC. The plaintiffs' bare allegation that Eagle knew upon receipt of the RICs that Continental retained a portion of the warranty/service charge is not sufficient, for "a complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." *Palda v. General Dynamics Corp., 47 F.3d 872, 875 (7th Cir. 1995)*. Here, the plaintiffs fail to assert any supporting facts that the alleged TILA violation was "apparent on the [*18] face" of the RICs. Accordingly, Count I is dismissed with respect to Eagle.

2. Counts II and III: The Illinois Consumer Fraud Act

Count II of the plaintiffs' complaint is based solely upon alleged violations of the Illinois Consumer Fraud Act, 815 ILCS 505/2. Count III likewise attempts to allege a cause of action against Eagle under the ICFA based upon Eagle's alleged violations of MVRISA, 815 ILCS 375/5. Eagle asserts that Counts II and III fail to allege any fraud or inequitable conduct by Eagle with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. As such, Eagle maintains that the plaintiffs' ICFA claims must be dismissed.

Rule 9(b) provides that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Rule 9(b) thus requires a complaint to state "'the identity of the person making the misrepresentation, the time, place, and context of the misrepresentation, and the method by which the misrepresentation was communicated.'" *Wade v. Hopper, 993 F.2d 1246, 1250 (7th Cir. 1993)* (quoting *Schiffels v. Kemper Financial Services, Inc., 978 F.2d 344, [*19] 352 (7th Cir. 1992)*), cert. denied, *114 S. Ct. 193 (1993)*. Moreover, when a complaint contains allegations of fraud involving multiple defendants, "the complaint must inform each defendant of the specific fraudulent acts which constitute the basis of the action against each particular defendant." *Bruss Company v. Allnet Communication Services, Inc., 606 F. Supp. 401, 405 (N.D.Ill. 1985)*. Complaints alleging violations of the Illinois Consumer Fraud Act are subject to the requirements of Rule 9(b). *Appraisers Coalition v. Appraisal Institute, 845 F. Supp. 592, 608-09 (N.D.Ill. 1994)*.

In the case at bar, the plaintiffs' complaint fails to satisfy the particularity requirements of Rule 9(b). The plaintiffs argue that because they have identified the RICs as the source of the misrepresentations, they have effectively complied with Rule 9(b). The amended complaint alleges, however, that Continental prepared the RICs in the allegedly improper manner. No involve-

ment by Eagle is alleged, nor have the plaintiffs specifically identified any of the information, as it pertains to Eagle, which Rule 9(b) requires. Although the alleged fraud exists in written form (the RICs), no facts [*20] are pleaded which describe how, where, or when Eagle participated in the alleged misrepresentations on the RIC. Bare, conclusory allegations of knowledge and general knowledge are not enough to sustain a claim. See *Apperson v. Ampad Corp., 641 F. Supp. 747, 751 (N.D.Ill. 1986)* (dismissing fraud claim because plaintiff only alleged knowledge of alleged misrepresentation in the written document). While we are required to draw all reasonable inferences in the plaintiffs' favor, we do not believe that the amended complaint, with respect to Eagle, alleges fraud with the degree of particularity required by Rule 9(b). Moreover, a court need not strain to find inferences available to the plaintiffs which are not apparent on the face of the complaint. *Coates v. Illinois State Board of Education, 559 F.2d 445, 447 (7th Cir. 1977)*. Accordingly, Counts II and III are dismissed as to Defendant Eagle.

3. Count IV: The Illinois Sales Finance Agency Act

In Count IV of the amended complaint, the plaintiffs allege an additional claim, solely against Eagle, under the Illinois Sales Finance Agency Act ("ISFAA"), 205 ILCS 660/8.5. The ISFAA contains numerous provisions which impose liability [*21] on purchasers of retail installment contracts which are known to violate MVRISA and other statutes. Accordingly, the plaintiffs assert that Eagle purchased the RICs with knowledge that the RICs failed to comply with MVRISA. Eagle argues that because the plaintiffs do not state a claim for relief against Eagle under TILA, Counts III and IV should also be dismissed as a matter of law. We agree. While we are aware that assignees are a primary target of the ISFAA, the plaintiffs' claims under ISFAA are nevertheless dependent on the success of its TILA and consumer fraud claims. Because those claims were found to be inadequate as a matter of law, we also dismiss Count IV.

C. Plaintiffs' Motion for Class Certification

In light of the impending passage of the Federal Reserve Board's proposed commentary to Regulation Z, the plaintiffs' complaint against Defendant Continental has been dismissed, with leave to reinstate should the final commentary reflect material changes. (The plaintiffs' complaint against Defendant Eagle has been dismissed in its entirety.) Given the dismissal of the action, we need not address the plaintiffs' motion for class certification as to the claims against [*22] Continental at the present time. Nevertheless, because the possibility exists that the action may be reinstated, we will briefly address the plaintiffs' motion for class certification.

The plaintiffs seek certification of a class consisting of all individuals who satisfy the following criteria:

a) They entered into a automobile transaction with Continental.
b) In connection with their automobile transaction, they purchased a service contract or extended warranty.
c) Their transaction was financed by a retail installment contract.
d) Their transaction was documented as a consumer transaction (i.e., TILA disclosures were given).
e) The retail installment contract contains the form of representations set forth in PP 11 and 18; i.e., states that an amount was paid to a third party on account of an extended warranty or service contract that is other than the amount actually collected by the third party. n1

See Amended Complaint at P 35. With respect to the TILA claim, the plaintiffs seek to have the class include anyone whose retail installment sales contract is dated on or after October 11, 1994, one year prior to the filing of this action. With respect to the [*23] Illinois Consumer Fraud Act claims, the plaintiffs seek to have the class include anyone whose retail installment sales contract was outstanding on or after October 11, 1992, three years prior to the filing of this action.

n1 The plaintiffs' amended complaint seeks certification of two classes. The first (Class A) pertains to Continental. The second (Class B) pertains to Eagle. Because Eagle's dismissal from the plaintiffs' action does not hinge upon the final content of the Federal Reserve Board's proposed commentary to Regulation Z, the plaintiffs' motion for class certification as to Class B is not addressed. Only the propriety of certifying Class A is here considered.

Pursuant to Rule 23 for an action to appropriately proceed as a class action, the suit must satisfy all of the criteria of Rule 23(a), as well as all of the criteria under one of the three categories of Rule 23(b). *Spencer v. Central States Southeast & Southwest Areas Pension Fund, 778 F. Supp. 985, 989 (N.D.Ill. 1991).* The four preliminary [*24] requirements of Rule 23(a) are as follows:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The party seeking to maintain an action as a class action has the burden of establishing that each of the requirements for class certification has been satisfied. *Spencer, 778 F. Supp. at 989.*

Although the defendant here takes issue with the plaintiffs' efforts to certify a class, the defendant is "swimming upstream" by so contending, for very persuasive authority favors the propriety of the plaintiffs' position. At least three judges in this district (including this judge) have certified class actions under virtually identical fact patterns. See *Cirone-Shadow v. Union Nissan of Waukegan, 1995 U.S. Dist. LEXIS 5232, 1995 WL 238680* (N.D.Ill. April 20, 1995) (Kocoras, J.); *Slawson v. Currie Motors Lincoln Mercury, Inc., 1995 U.S. Dist. LEXIS 451, 1995 WL 22716* (N.D.Ill. January 5, 1995) (Holderman, J.); Mejia [*25] v. River Oaks Imports, Inc., No. 94 C 2748 (N.D.Ill. December 14, 1994) (Leinenweber, J.). Given this circumstance and the fact that the classes sought to be certified in each of these cases was likewise extremely similar to the case at bar, we grant the plaintiffs' motion for class certification as to Class A. Should the action against Continental be reinstated, the plaintiffs' will be entitled to proceed as a class.

CONCLUSION

For the reasons set forth above, Eagle's motion to dismiss is granted. Although Plaintiffs are granted leave to reinstate the complaint against Continental pending a March 1996 disposition by the Federal Reserve Board, we grant Continental's motion to dismiss for the present time. Should the action be reinstated, the plaintiffs motion for class certification as to Class A is granted.

Charles P. Kocoras

United States District Judge

Dated: February 15, 1996

Attachment "B "

judicial notice, regarding the pre-August 8, 1995 tariffs filed by certain defendants with the PUC. We have upheld against demurrer the cause of action that alleges these tariffs were violated (the seventh cause of action). Plaintiffs will now be held to their proof.
We have also denied the plaintiffs' second request for judicial notice, which encompassed many of the FCC rulings we have already discussed as well as some advertising materials of the defendants.

3. The Plaintiffs' Challenges to the Defendants' Disclosure of the Rates Being Charged

[9] The plaintiffs have also alleged that defendants concealed, inadequately disclosed or misrepresented the particular charges that plaintiffs challenge:
rounding-up (second cause of action); billing from "send to end" (third and fourth causes of action); ring tline for complete (connected) calls only (fifth and sixth causes of action); overcharging for incomplete calls (seventh cause of action); and 'lag time' disconnection (eighth and ninth causes of action). In each of these causes of action, plaintiffs have requested generically-phrased injunctive and restitution relief that can be applied to a nondisclosure claim.

As we have alluded to previously. section 332(c)(3)(A) does not preempt a plaintiff from maintaining a state law action in state court for an alleged failure to disclose a particular rate or rate practice; section 332(c)(3)(A) only preempts a state law action challenging the reasonableness or legality of the particular rate or rate practice itself. (See Weinberg v. Sprint Corp. (D.N.J.1996) 165 F.R.D. 431, 438439; In rc Long Distance Telecommunications Litigation (6th Cir. 1987) 831 F.2d 627, 633-634; DeCastro v. AWACS. Inc., supra, 935 F.Supp. at pp. 550-551; Comcas *811 Cellular, supra, 949 F.Supp. at pp. 1199-1201; Sanderson, supra, 958 F.Supp. at Pp. 955-956; Day v. AT & T Corp. (1998) 63 Cal.App.4th 325, 328-329, 336-340, 74 Cal.Rptr.2d 55; Tenore, supra, 136 Wash.2d 322, 962 P.2d 104, 107, 111-115; In re Southwestern Bell Mobile Systems, Inc., supra, F.C.C. 99-356, ¶ 23.) This is because section 332(c)(3)(A) prohibits a state from regulating "the entry of or the rates charged by" any cellular service, but allows a state to regulate "the other terms and conditions," including "customer billing information" and 'other consumer protection matters." (See Tenore, supra, 962 P.2d at p. 111; see also H.R.Rep. No. 103-111, p.588.)

~~Through their generically-phrased injunction requests, plaintiffs could seek either full disclosure of the challenged charges or to enjoin these charges pending full disclosure. (See Comcast Cellular, supra, 949 F.Supp. at p. 1201.) The plaintiffs' generically-phrased restitution requests could be justified on the basis of nondisclosure too, though this may be more problematic. (See ibid.; see and compare Day v. AT & T Corp., supra, 63 Cal.App.4th at pp. 336-340, 74 Cal.Rptr.2d 55, with Tenore, supra, 962 P.2d at pp. 108-115; see also In re Long Distance Telecommunications Litigation, supra, 831 F2d at pp. 632-634.)~~

~~In any event, plaintiffs have alleged a sufficient state law basis for an action (nondisclosure as an unfair or unlawful business practice under Business & Professions Code section 17200 Ct seq.), and a sufficient remedy as part of that action (injunctive relief and perhaps monetary relief as well).~~ Under our standard of review for a demurrer sustained without leave to amend, there is a reasonable possibility that plaintiffs can allege state law causes of action based on inadequate disclosure of non-communication time charges (nondisclosure as an unfair or unlawful business practice under Business & Professions Code section 17200 et seq.), and a sufficient remedy as part of that action (injunctive relief). (See Comcast Cellular, supra, 949 F.Supp. At p. 1201.).[4] Since

[4] At this juncture, we express no views on the possibility of restitution as a remedy. (See Comcast Cellular, supra, 949 F.Supp. At p. 1201; see and compare Day v. AT&T Corp., supra, 63 Cal. App. 4th at pp. 336-

section 332(c)(3)(A)'s preemptive power does not apply in this disclosure arena, the effective date of section 332(c)(3)(A) in California (August 8, 1995) is irrelevant to these causes of action.

DISPOSITION

The judgment is reversed. The plaintiffs are granted leave to amend their complaint consistent with the views expressed herein. Each side shall pay its own costs on appeal.
BLEASE,
concur.
Acting P.S., and CALLAHAN, 1.,
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340, with Tenore v. AT&T Wireless SVCS, supra, 962 P.2d at pp. 108-115; see also In re Long Distance Telecommunications Litigation, supra, 831 F.2d at pp. 632-634.)

*81 Cal. App. 4th 529, *; 2000 Cal. App. LEXIS 451, **;*
*96 Cal. Rptr. 2d 801, ***; 2000 Cal. Daily Op. Service 4523*

SUSANNE BALL et al., Plaintiffs and Appellants, vs. GTE MOBILNET OF CALIFORNIA et al., Defendants and Respondents.

C031783

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

81 Cal. App. 4th 529; 2000 Cal. App. LEXIS 451; 96 Cal. Rptr. 2d 801; 2000 Cal. Daily Op. Service 4523; 2000 Daily Journal DAR 6091

June 8, 2000, Filed

NOTICE: [**1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

SUBSEQUENT HISTORY: As Modified on Denial of Rehearing July 6, 2000, Reported at: 2000 Cal. App. LEXIS 529.

PRIOR HISTORY: APPEAL from judgment of the Superior Court of the County of Sacramento. Super. Ct. No. 98AS03811. John R. Lewis, Judge.

DISPOSITION: Reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants challenged the ruling of the Sacramento County (California) Superior Court, which held that appellants' claims of unfair business practices in violation of Cal. Bus. & Prof. Code § 17200 et seq. were preempted by the 1993 amendments to the Communications Act of 1934, 47 U.S.C.S. § 151 et seq.

OVERVIEW: Plaintiffs, objecting to having to pay for non-communication time on cellular phones (essentially, non-talking time, including "rounding-up" to the next full minute), sued respondents, every major provider and owner of cellular phone services and related wireless services in the state. Plaintiffs alleged the practice constituted unfair business practices in violation of Cal. Bus. & Prof. Code § 17200 et seq. The trial court dismissed, holding that the claim was preempted by 47 U.S.C.S. § 332(c)(3)(A). On appeal, the court reversed, holding that while appellants could not invoke state law regarding non-communication time after August 7, 1995, when § 332(c)(3)(A) took effect, appellants could invoke state law to complain that such charges were not disclosed, because such disclosure was a "term and condition" over which the state could exercise its laws. Appellants could also claim that defendants violated their pre-August 8, 1995 tariffs on file with the public utilities commission.

OUTCOME: Trial court reversed. While appellants could not invoke state law regarding non-communication charges after the effective date of amendments to the federal communications law, they could complain that such charges were "terms and conditions" not disclosed under state law. Appellants could also claim that defendants violated their pre-amendment tariffs.

CORE TERMS: cellular, rates charged, cause of action, billing, non-communication, provider,